STATE OF MICHIGAN

COURT OF APPEALS

CINCINNATI INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellant,

v

JUDITH ANN EYDE, SAM X. EYDE, and EYDE CONSTRUCTION COMPANY,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
August 23, 2005

No. 251627
Ingham Circuit Court
LC No. 01-092957-PZ

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order granting partial summary disposition to defendants. We reverse.

Defendants owned a commercial warehouse facility in Lansing that was substantially destroyed by a fire on December 3, 1998. Defendants had obtained various insurance coverages on the building from plaintiff; the policies were in effect at the time of the fire. Plaintiff and defendants received several significantly varying repair estimates. Plaintiff tendered $30,000 to defendants for the contents of the building and informed defendants that it was invoking the appraisal process under the policy because of the wide variation in repair estimates. Plaintiff also requested that defendants complete and return a formal proof of loss form, which defendants failed to do. However, plaintiff made an advance payment of $100,000. The parties negotiated for months in an attempt to agree on an umpire for the appraisal process.

After negotiations failed, plaintiff filed a complaint in the Ingham Circuit Court, requesting that an impartial umpire be selected. See MCL 500.2833(1)(m). Defendants counterclaimed, seeking various declarations; they requested that the court grant them all damages to which they were entitled, including penalty interest. After an umpire was appointed, plaintiff's claim was dismissed as moot, but the counterclaim continued.

The umpire issued an award determining that the fair market value of the loss of the building was $256,852 (of which $25,000 was for loss of rent), which plaintiff promptly paid. The award did not include any provision for statutory penalty interest because the umpire believed that such a determination exceeded his statutory duties. The award also did not include

consideration of rental loss above $25,000. However, the umpire noted that preliminary documentation suggested that such coverage was purchased. The issues of interest and of rental loss returned to the trial court.

Defendants filed a motion for summary disposition under MCR 2.116(C)(9) and (C)(10). After hearing oral arguments, the court granted partial summary disposition to defendants, awarding statutory penalty interest on $153,000 and finding that defendants had purchased coverage for loss of rents in excess of $25,000 and was owed such benefits.

Plaintiff first argues that the court wrongly found that the policy included coverage for loss of rent monies in excess of $25,000.[1]

A trial court's decision with regard to a motion for summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 272; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 278. The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record reveals an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). This Court reviews a trial court's interpretation of an insurance contract de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Insurance contracts are construed in accordance with principles of contract construction. *Farmers Ins Exchange v Kurzman*, 257 Mich App 412, 417; 668 NW2d 199 (2003). "An insurance policy must be enforced in accordance with its terms." *Frankenmuth Mut Ins v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). "Where there is no ambiguity, we will enforce the terms of the contract as written." *Id*.

> The parties' policy caps coverage for loss of rents at $25,000, providing:
> Business income and extra expenses. . . . We will pay for the actual loss of 'Business Income' and 'Rental Value' you sustain due to necessary 'suspension' of your 'operations' during the 'period of restoration.' . . . The most we will pay for 'loss' under this 'Business Income' and 'Extra Expenses' Coverage Extension is $25,000 in any one occurrence.

The Commercial Property Coverage Part Declarations appear to detail defendants' coverage selections and indicate that defendants chose "Blanket Business Income with Extra Expenses (ii)." This apparently cross references to a policy provision, which reads:

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[1] Initially, we note that we reject plaintiff's argument that defendants failed to raise this issue properly in the trial court. Indeed, defendants stated in their countercomplaint that the insurance policy had been breached and requested "all damages to which they are entitled."

A. COVERAGE

Coverage is provided as described below for one or more of the following option [sic] for which a Limit of Insurance is shown in the Declarations.

(i) Business Income including rental "Rental Value".

(ii) Business Income other than "Rental Value".

(iii) "Rental Value".

If option (i) above is selected, the term Business Income will include "Rental Value". If option (iii) above is selected, the term Business Income will mean "Rental Value" only.

The plain language of the contract, taken in the light most favorable to plaintiff, suggests that the contract did *not* include coverage for loss of rents in excess of $25,000. However, it is not entirely clear to us that the policy is to be cross-referenced in the fashion set forth above. Moreover, defendants submitted affidavits indicating that they paid for extra rental coverage, that plaintiff accepted the payment, and that, according to plaintiff, a clerical error omitted the rental coverage from the written terms of the policy.[2] Plaintiff offered affidavits indicating that the extra payments went toward coverage other than rental coverage and that no clerical error occurred.

The competing affidavits and the less-than-clear policy language demonstrate that there is a genuine issue of material fact regarding whether defendants purchased coverage for loss of rents in excess of $25,000. Thus, the trial court erred by granting partial summary disposition to defendants with respect to this issue.

Next, plaintiff argues that the court wrongly granted penalty interest to defendants.

As noted above, a trial court's decision on a motion for summary disposition is reviewed de novo. *Corley, supra* at 272. The heart of the argument between the parties is whether MCL 500.2006 requires plaintiff to pay penalty interest to defendants. This analysis involves contract interpretation and statutory interpretation. This Court reviews a trial court's interpretation of an insurance contract de novo. *Henderson, supra* at 353. Statutory interpretation is a question of law that is considered de novo on appeal. *People v Davis*, 468 Mich 77, 79, 658 NW2d 800 (2003).

MCL 500.2006, provides, in pertinent part:

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[2] It is probable that the statements contained in the affidavits that are attributable to plaintiff, which plaintiff labels as "hearsay," qualify as admissions of a party opponent. See MRE 801(D)(2).

> (1) A person must pay on a timely basis to its insured . . . the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured . . . 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
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> * * *
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> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at a rate of 12% per annum. . . .

Plaintiff made timely payment under its policy. An insurance policy must be enforced according to its terms. *Frankenmuth Mut Ins*, *supra* at 111. When there is no ambiguity, this Court must enforce the terms of the contract as written. *Id*. In 1999, plaintiff informed defendants that they were invoking the appraisal process under the policy because of the wide variation in repair estimates. Plaintiff also requested that defendants complete and return a formal proof of loss form, and defendants failed to do this, even though they were bound by the policy to submit a sworn proof of loss containing the information requested by plaintiff within sixty days. By the terms of its policy, plaintiff was not required to make payment until it received a sworn proof of loss *and* an appraisal award was issued or an agreement regarding loss was reached; therefore, plaintiff's payment was timely made. Plaintiff promptly made payment after the appraisal award was issued.

Moreover, the amount of the claim was reasonably in dispute. The parties attempted for months to agree on an umpire as required by the appraisal provision in their contract and, when this failed, an umpire was assigned by the Ingham Circuit Court. See MCL 500.2833(1)(m). This Court previously examined the relationship between a statutorily mandated appraisal process and the twelve percent penalty interest in *OJ Enterprises, Inc v Ins Co of North America*, 96 Mich App 271, 274-275; 292 NW2d 207 (1980) (citations omitted):

> We believe that the 12 per cent interest statute was never triggered in this case because the proof of loss originally submitted was not 'satisfactory', but was the subject of an appraisal dispute which was settled under the terms of the Michigan Standard Fire Policy Statute, MCL 500.2832.
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> The 12 per cent interest rate is a penalty to be assessed only against insurers who procrastinate in paying meritorious claims. It is inconceivable that the Michigan Legislature in enacting the two statutes would have intended to penalize insurers for seeking settlement of a disputed claim through the appraisal process. We must conclude that when the amount of the loss is reasonably disputed by the insurer and the insured and the matter is submitted to a court-appointed appraiser, MCL 500.2006(4) should be read in conjunction with MCL 500.2832. This statute states:

> 'When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.'
>
> Therefore, insurers will be allowed up to 60 days from the date of the appraiser's award to pay awarded benefits to policyholders.
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> In the instant case, the appraisal of $88,796 was made on November 14, 1978. The defendant paid plaintiff the remainder of the sum owed on January 8, 1979, within the 60-day period, hence, the 12 per cent interest penalty was never triggered. It must be concluded that the trial judge correctly denied interest under MCL 500.2006(4).

Accordingly, a claim is not reasonably in dispute while the parties are engaged in the appraisal process. Moreover, as plaintiff argues, the estimate of $153,000 was in dispute because it did not account for the depreciated value of the destroyed building. Summary disposition was inappropriate, because plaintiff's payment was timely under the policy and the amount of the claim was reasonably in dispute under MCL 500.2006(1).[3]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette

[3] We decline to address defendants' poorly briefed argument that they are entitled to "compensatory interest." See *Palo Grp Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998) (discussing inadequate briefing).